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9 ARA E. AVETYANTS

10 UNITED STATES DISTRICT COURT

11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 (HONORABLE ROGER T. BENITEZ)

13 UNITED STATES OF AMERICA, ) No. CR 08-1455 BEN  
14 Plaintiff, ) DEFENDANT AVETYANTS' REPLY TO THE  
15 v. ) GOVERNMENT'S OPPOSITION TO  
16 ARA E. AVETYANTS, et al. ) DEFENDANT AVETYANTS' MOTION TO  
17 Defendants. ) SUPPRESS EVIDENCE AND STATEMENTS;  
18 ) DECLARATION OF DEFENDANT AVETYANTS  
19 ) IN SUPPORT THEREOF  
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Date: September 12, 2008  
Time: 2:00 p.m.

20 Defendant ARA E. AVETYANTS, by and through his counsel of  
21 record, GARO B. GHAZARIAN, hereby submits his reply to the  
22 Government's opposition to his motion for suppression of  
23 evidence and statements.

24 This reply is based upon the attached memorandum of points  
25 and authorities, declaration of defendant ARA E. AVETYANTS,  
26 defendant ARA E. AVETYANTS' motion for suppression of evidence  
27 and statements, the Government's opposition to defendant's  
28 motion for suppression of evidence and statements, the files  
and records in this case, and on such further evidence and/or  
argument as may be presented at hearing on this motion.

1 Dated: September 3, 2008

Respectfully submitted,

2 /s/ Garo Ghazarian  
3 GARO B. GHAZARIAN  
4 Attorney for Defendant  
ARA E. AVETYANTS

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1                   **MEMORANDUM OF POINTS AND AUTHORITIES**  
23                   **I.**4                   **INTRODUCTION**

5                   Faced with a scenario that strongly suggests overreaching  
6 by its agents, the Government nonetheless insists that its  
7 initial stop of the vehicle was lawful; its second stop of the  
8 defendant was lawful; and, its search and seizure of the fruits  
9 of that search lawful since the defendant gave consent. The  
10 Government further contends that defendant AVETYANTS was not in  
11 custody for the purposes of Miranda.

12                  The facts before this Court flatly refute the Government's  
13 characterization of the encounters as lawful and unobtrusive.  
14 Both the first and the second stops were illegal and all  
15 evidence obtained as a result must be suppressed.

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17                  **II.**18                  **THE INITIAL STOP OF DEFENDANT AVETYANTS WAS NOT  
19                  BASED ON ARTICULABLE SUSPICION**

20                  The Government characterizes the initial stop as lawful.  
21 However, the stop itself is suspect. Law enforcement must  
22 justify the detention with specific articulable facts that  
23 create a reasonable suspicion that the person stopped has been,  
24 is, or is about to be engaged in criminal activity. United  
25 States v. Cortez, (1981) 449 U.S. 411, 417; United States v.  
26 Brignoni-Ponce, (1975) 422 U.S. 873, 884. This, the Government  
27 has failed to do.

1       The Government heavily relies on Brignoni-Ponce, supra. It  
2 should be noted that the facts of this case are different from  
3 Brignoni-Ponce. In Brignoni-Ponce, as part of its regular  
4 traffic-checking operations in Southern California, the Border  
5 Patrol operated a fixed checkpoint on interstate highway 5  
6 south of San Clemente. On the evening of the night in question,  
7 the fixed checkpoint was closed because of inclement weather,  
8 but two officers were observing northbound traffic from a  
9 patrol car parked at the side of the highway. The road was  
10 dark, and they were using the patrol car's headlights to  
11 illuminate passing cars. They pursued defendant's car and  
12 stopped it because its three occupants appeared to be of  
13 Mexican descent. Id. page 875. On certiorari, the court  
14 affirmed the judgment of the appellate court which reversed  
15 defendant's conviction on grounds of an illegal stop by the  
16 border patrol, holding that officers could stop vehicles only  
17 if they were aware of specific articulable facts, together with  
18 rational inferences from those facts, that reasonably warranted  
19 suspicion that the vehicles contained illegal aliens. The  
20 apparent Mexican ancestry of the occupants did not furnish  
21 reasonable grounds to believe that the three occupants were  
22 aliens.

23       Here, the Government claims that:

24       1. The location where the car was stopped was in very  
25           close proximity to the border.

26       2. There were multiple occupants in a 2008 BMW 5 series,  
27           which is a highly unusual vehicle for this area.

28       3. The vehicle had no license plates.

4. The behavior of the occupants, throwing items out of the window, particularly documents such as receipts and banking documents.

The above asserted facts by the Government do not rise to the level of reasonable articulable suspicion. The Government improperly relies heavily on Brignoni-Ponce. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located near the border. Brignoni-Ponce, supra, at page 882. Here, the Government does not meet its burden of showing that the stop was properly premised upon articulable suspicion.

III.

## THE SECOND STOP WAS ILLEGAL

19       Contrary to the Government's next argument, there is no  
20 basis for initiating a second detention two hours later, with  
21 the subsequent search of the vehicle. Once again, law  
22 enforcement had failed to marshal "specific articulable facts"  
23 that created a reasonable suspicion that the person stopped had  
24 been, is, or is about to be engaged in criminal activity. .

25 United States v. Cortez, (1981) 449 U.S. 411, 417; United  
26 States v. Brignoni-Ponce, (1975) 422 U.S. 873, 884.

27       Turning to the facts of this case, it is defendant  
28 AVETYANTS' position that the second detention was not

1 justified. The defendant's conduct, being in a park and  
2 standing next to the car, yielded nothing suspicious, and did  
3 not give rise to any specific articulable facts that he was  
4 engaged in criminal activity.

5 It is noteworthy that the Government seems to engage in  
6 fact finding to analyze the efficacy of the second detention.  
7 Again, Agent Stallings was present in close proximity of Agent  
8 Zoetewey while the latter was conducting the immigration  
9 inspection on the defendants. Agent Stallings had no basis for  
10 suspecting the immigration status of the defendants where he  
11 was clearly aware that two hours earlier Agent Zoetewey was  
12 satisfied with the immigration status of defendant AVETYANTS,  
13 and the co-defendants.

14 Under the facts of this case, no valid and articulable  
15 suspicion could have been formed by Agent Stallings. The  
16 general characteristics pertaining to defendant AVETYANTS  
17 provide an insufficient basis for a detention.

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#### IV.

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#### **THE ABSENCE OF CONSENT MANDATES SUPPRESSION OF THE FRUITS OF THE ILLEGAL SEARCH OF THE VEHICLE**

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While a show of physical force certainly demonstrates a  
show of authority, the absence of such force does not  
automatically determine whether a reasonable person feels free  
to leave. United States v. Beraun-Panaez, (9<sup>th</sup> Cir. 1987) 812  
F.2d 578.

Because the detention was illegal, the warrantless search  
of his car which followed was not supported by probable cause.

1 Defendant AVETYANTS' purported "consent" was vitiated by the  
2 oppressive and intimidating atmosphere created by Agent  
3 Stallings, which could only lead a reasonable person to believe  
4 that he was not free to refuse to have the vehicle searched.

5

6 **v.**

7

**CONCLUSION**

8 Based on the foregoing, defendant AVETYANTS respectfully  
9 requests that this Court order:

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11 1. That the evidence obtained, including the defendant's  
12 alleged statements to the Border Patrol Agents at the time of  
13 the initial stop as well as the second stop, be suppressed, as  
14 the Government cannot meet its burden of showing that the  
15 detentions, the questioning of the defendant and subsequent  
16 search of the vehicle was lawful;

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18 In the alternative, defendant AVETYANTS respectfully  
19 requests that this Court order:

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21 2. An evidentiary hearing, at which time the Government  
22 must meet its burden showing that the detention was lawful, and  
23 that the alleged consent to the search of the defendant's car  
24 was freely and voluntarily given; and

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26 3. That Border Patrol Agent Zoetewey and Agent Stallings  
27 appear at the evidentiary hearing for the purpose of providing  
28 testimony; and, that the Border Patrol Agents bring with

1 themselves their Standard Training Manual and all records of  
2 in-service training to the hearing.

3 Dated: September 3, 2008 Respectfully submitted,

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5 /s/ Garo B. Ghazarian  
6 GARO B. GHAZARIAN  
7 Attorney for Defendant  
8 ARA E. AVETYANTS  
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